

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0380

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE A. HARPER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

MYSE, J. George Harper appeals a judgment of conviction for second offense operating a vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. Harper contends that the trial court erred by finding that the arresting officer had probable cause to arrest him for driving while intoxicated. Although Harper concedes that the arresting officer had probable cause to believe he was intoxicated, he argues that the officer had no probable cause to believe he had been operating a motor vehicle. Therefore, Harper claims that the physical evidence of his intoxication, including his breath alcohol test, should be suppressed. Because this court concludes that the trial court properly employed the collective knowledge rule to find that the arresting officer had probable cause, the judgment of conviction is affirmed.

On January 27, 1994, Eau Claire County Deputy Sheriff Scott Kuehn, and Officer Paul White and Sergeant John Modl from the Altoona Police Department were dispatched to the Happy Hollow Tavern in Altoona, Wisconsin. The initial dispatch reported that there was an unruly patron at the tavern who refused to leave. After receiving the dispatch, Kuehn radioed White and Modl to determine if they would like his assistance. White and Modl responded in the affirmative. When Kuehn arrived on the scene, he found Harper sitting in his pickup truck with the motor running. After parking his vehicle behind Harper's truck to prevent Harper from leaving, Kuehn exited his vehicle and walked to the side of Harper's truck. Kuehn advised Harper that there was a report of a disturbance at the tavern and asked Harper to stay on the scene until officers from the Altoona Police Department arrived. Kuehn stated that during his conversation with Harper, he detected a slight smell of alcohol emanating from Harper and noticed that Harper appeared to be tired. Based on these observations, Kuehn concluded that Harper was possibly under the influence of an intoxicant.

Shortly after Kuehn arrived, Officer Paul White and Sergeant Modl arrived on the scene. Kuehn advised White that Harper was possibly intoxicated, but stated that he had no recollection of specifically advising White that Harper was operating his truck. Kuehn did, however, acknowledge that he had a radio conversation with the Altoona officers in which he told them that he believed he had the subject in a brown pickup and that the subject might be intoxicated. White, however, stated that he did not see Harper operate his vehicle and that he did not receive any specific information to that effect.

After informing White and Modl that Harper was possibly intoxicated, Kuehn left the scene. White then requested Harper to perform a series of field sobriety tests. Harper failed to perform the tests in a satisfactory fashion. White then gave Harper a preliminary breath test, which indicated a breath alcohol concentration of .12%, and placed Harper under arrest.

Harper subsequently filed a motion to suppress, arguing that the officers did not have probable cause to arrest him. Specifically, Harper argued that White did not have probable cause to believe Harper was or had been operating a vehicle. The trial court, however, found that White did receive knowledge both of Harper's intoxication and his operation of the vehicle.

Accordingly, the trial court concluded that there was probable cause for Harper's arrest and denied the motion. Harper appeals.

The sole issue on appeal is whether White had probable cause to believe Harper was operating his vehicle at the time of the arrest. Whether the evidence is sufficient to constitute probable cause is a question of law that this court reviews without deference to the trial court. *State v. Drogsvold*, 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981). To determine whether probable cause exists, this court must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Welsh*, 108 Wis.2d 319, 329, 321 N.W.2d 245, 251 (1982). It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]." *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). Finally, we note that the probable cause assessment is not to be made solely on the knowledge possessed by the arresting officer, but on the collective knowledge of the police department. *State v. Mabra*, 61 Wis.2d 613, 625-26, 213 N.W.2d 545, 551 (1974).

In this case, the trial court concluded that the collective knowledge of Kuehn and White was sufficient to provide White with probable cause to believe Harper was operating his vehicle. Harper concedes that Kuehn had probable cause to arrest him for driving while under the influence of an intoxicant. However, Harper contends that the trial court improperly relied on the collective knowledge rule to impute Kuehn's knowledge to White. Harper contends that the collective knowledge rule is only applicable where the knowledge in question is communicated to the arresting officer. As support for this proposition, Harper cites 2 WAYNE LAFAYE, SEARCH AND SEIZURE (2d ed. 1987). In his learned treatise, LaFave states that communication should be a prerequisite to the application of the collective knowledge rule "where the officer who did possess the probable cause was not in a close time-space proximity to the questioned arrest or search." *Id.* at § 3.5(c). Thus, relying on White's statement that he did not receive any specific information that Harper was operating his vehicle, Harper contends that the trial court erroneously relied on the collective knowledge rule to find that White had probable cause.

It is true that the collective knowledge rule is generally applicable only where the knowledge possessed by other members of the police department is communicated to the arresting officer. *See generally State v. Cheers*, 102 Wis.2d 367, 388-89, 306 N.W.2d 676, 685 (1981); *Mabra*, 61 Wis.2d at 625-26, 213 N.W.2d at 551. However, this general rule is not without its exceptions. As the above quote from LaFave demonstrates, communication is only a necessary prerequisite to the application of the collective knowledge rule where the officer possessing probable cause is not in "close time-space proximity to the questioned arrest or search." LAFAVE, *supra* § 3.5(c). Thus, if Kuehn and White were working in close proximity to one another, Kuehn's knowledge could be imputed to White under the collective knowledge rule, regardless of whether Kuehn actually communicated that knowledge to him. *See id.*

In this case, both officers responded to a dispatch indicating that there was a disturbance at the Happy Hollow Tavern. Upon receiving the dispatch, Kuehn offered his assistance, which White and Modl accepted. When Kuehn arrived on the scene, he found Harper sitting in his brown pickup with the motor running. Kuehn parked his vehicle behind Harper's and requested Harper to remain on the scene until White and Modl arrived. Kuehn then radioed White and Modl a second time to apprise them of the situation. When White and Modl subsequently reached the scene, Kuehn remained with Harper while White spoke to the bartender outside the tavern. After speaking with the bartender, White spoke with Kuehn, at which time Kuehn advised him that Harper could be intoxicated.

These facts thoroughly demonstrate that Kuehn and White were working in close proximity on the evening that Harper was arrested. Kuehn and White were on the scene together, they cooperated in the initial investigation of the disorderly conduct incident and they had communications regarding Harper's status. Accordingly, regardless whether Kuehn actually communicated his knowledge that Harper was operating a vehicle to White, this court concludes that the trial court properly considered the collective knowledge of White and Kuehn in determining that probable cause existed for Harper's arrest.¹

¹ Because Harper concedes that there was sufficient probable cause within the collective

By the Court. – Judgment affirmed.

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(..continued)

knowledge of the officers to warrant his arrest for driving while intoxicated, we need not address this issue.